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NO. 92-9049

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALFRED ARTHUR SANDOVAL, Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Was petitioner deprived of due process and a fair jury trial by the use of California's reasonable doubt instruction?

2. Did the California Supreme Court fail to conduct a constitutionally adequate harmless error review and thereby deprive petitioner of due process and subject him to cruel and unusual punishment?

3. Does the California Supreme Court's affirmance rate demonstrate a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review?

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BRIEF OF RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

Petitioner, Alfred Arthur Sandoval, seeks review of the California Supreme Court's decision affirming his convictions for murder and judgment of death. The opinion was issued on December 14, 1992, and is reported at 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (1992). A copy of the opinion is attached as Appendix A to petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution which are set forth in the Petition for Writ of Certiorari at page 2.

STATEMENT OF THE CASE

Petitioner was sentenced to death under the current California Death Penalty Law enacted in 1978 by initiative, following his convictions for the attempted murder of Manuel Torres and the first degree murders of Gilbert Martinez, Anthony Aceves, Raymond Wells, and Marlene Wells.

The prosecution evidence at the guilt phase of petitioner's trial established that on October 14, 1984, petitioner shot and killed Gilbert Martinez and Anthony Aceves during a gang-related fight at Belvedere Park in Los Angeles. He also attempted to kill Manuel Torres during the gang fight. Several eyewitnesses saw petitioner kill his unarmed victims. Reporter's Transcript on Appeal [hereinafter RT], pp. 2354-2650. Petitioner's theory of defense was self-defense. RT 4369-4370, 4404.

On October 31, 1984, petitioner shot and killed Ray and Marlene Wells in their home, because they had given police information concerning the location of the car petitioner used on the night of the Belvedere Park murders. Petitioner telephoned Benjamin Verduzco after the murders and told him that he had committed the murders because the Wells' had snitched to the

police about his car. RT 3264-3297. Petitioner presented an alibi defense. RT 4569, 4958-4966, 5031-5054.

The jury convicted petitioner of four counts of first degree murder and also found true four allegations of the special circumstance of multiple murders, within the meaning of California Penal Code section 190.2(a)(3). The jury also convicted petitioner of one count of attempted murder. Clerk's Transcript on Appeal [hereinafter CT], pp. 1495-1496, 1608.

At the penalty phase, the prosecution presented the following evidence in aggravation: 1) petitioner's 1978 assault with a deadly weapon upon a police officer; 2) petitioner's 1979 conviction of assault with intent to kill; 3) petitioner's 1985 felonious assault and infliction of great bodily injury upon Guy Walker at the Los Angeles County Jail. RT 5718-5743, 5786-5798, 5824-5831, 5854-5864. In mitigation, petitioner presented evidence concerning the Walker incident, his in-custody behavior at county jail, his childhood, and his family and friends. RT 5879-5898, 5940-5957, 5997-6006, 6041-6084, 6123-6131, 6174-6188, 6222-6227, 6379-6389, 6412-6416.

The jury found life without the possbility of parole to be the appropriate punishment for the murders of Gilbert Martinez, Anthony Aceves, and Raymond Wells. The jury found death to be the appropriate punishment for the murder of Marlene Wells. CT 1733.

Petitioner's appeal to the California Supreme Court was automatic under California law. The California Supreme Court

affirmed the judgment and penalty in its entirety. The petition for reheaing was denied. Petition, Appendix B. A Petition for Writ of Habeas Corpus is currently pending in the California Supreme Court.[1]

SUMMARY OF REASONS FOR DENYING THE PETITION

First, CALJIC No. 2.90 is constitutionally sound. That instruction, unlike the Louisiana instruction condemned by this Court in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), does not transform the traditional definition of reasonable doubt into a higher degree of doubt.

Second, petitioner's complaint concerning the California Supreme Court's harmless error review addresses a matter of state law and also is unfounded. What may or may not have happened in the course of the California Supreme Court's appellate reviews of other capital cases has no bearing on the issue whether in this case petitioner has suffered a constitutional deprivation at the hands of the state high court. Moreover, the California Supreme Court conducted a constitutionally adequate harmless error review of prosecutorial misconduct during penalty phase final argument to the jury in this case.

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1. Three of the issues raised by petitioner in the pending Petition for Writ of Habeas Corpus in the California Supreme Court are noted on page 22 of the Petition for Writ of Certiorari (ie. the prosecution's alleged failure to disclose benefits conferred on its star witnesses, the failure to correct the witnesses' alleged false testimony denying such benefits, and defense counsel's alleged failure to investigate mitigating evidence.)

ARGUMENT

I

THE JURY WAS PROPERLY INSTRUCTED ON THE DEFINITION OF REASONABLE DOUBT

Relying upon this Court's opinion in Cage v. Louisiana 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), petitioner contends the California reasonable doubt instruction, CALJIC No. 2.90, improperly dilutes the prosecution's constitutionally imposed burden of proof beyond a reasonable doubt.[2/] Petition, pp. 4-11. Petitioner's contention is without merit.

Respondent first notes that this Court's opinion in Cage does not in any way refer to or rule upon the California instruction on reasonable doubt. In fact, the opinion does not invalidate any reasonable doubt instruction other than the Louisiana instruction considered therein. Further, the opinion does not purport to define the term "reasonable doubt" and does not supply an instruction on the subject. It is clear from a reading of the opinion, which is less than two pages in length,

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2. CALJIC No. 2.90, as given in this case, provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] guilt is satisfactorily shown, [he] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: it is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." CT 604; emphasis added.

that any extension of its holding beyond the scope of the instruction actually considered therein exceeds the intent of the opinion. See, Gaskins v. McKellar, __ U.S. __, 111 S. Ct. 2277 114 L.Ed.2d 728 (1991); U.S. v. Nolasco, 926 F.2d 869, 871-873 (1991).

Moreover, CALJIC No. 2.90, which embodies the California reasonable doubt concept, bears little similarity to the Louisiana instruction considered in Cage. In fact, the only similarity between the two instructions is the use of the phrase "moral certainty." That phrase, in and of itself, is not offensive to constitutional standards. Instead, this Court was critical of the terms "grave uncertainty" and "actual substantial doubt" which are found in the Louisiana instruction:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage v. Louisiana, supra, 490 U.S. 39, 111 S.Ct. 328, 329-330, 112 L.Ed.2d 339.

The terms "grave uncertainty" and "actual substantial doubt" are not used in CALJIC No. 2.90. Thus, respondent

submits, a reasonable juror would not have interpreted CALJIC No. 2.90 to allow a finding of guilt on a degree of proof below that required by the Due Process Clause.[3]

Moreover, the Cage instruction performs the exact opposite function of the California instruction considered here. In Cage, the instruction reads:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral

3. In People v. Jennings 53 Cal.3d 334, 279 Cal.Rptr. 780, 807 P.2d 1009 (1991), the California Supreme Court specifically found that CALJIC No. 2.90, unlike the instruction discussed in Cage, does not transform the traditional definition of reasonable doubt into a higher degree of doubt. Id., at p. 386.

> certainty." Cage, supra, 490 U.S. 39, 111 S.Ct. 328, 329, 112 L.Ed.2d 339.

As can be seen by a simple review of the Cage instruction, the instruction begins by telling the juror that he is required to acquit if he has a reasonable doubt as to guilt. However, the instruction then quickly focuses on impressing upon the juror that the doubt must be substantial. It concludes with the constitutionally offensive statement that, "What is required [to convict] is not an absolute or mathematical certainty, but a moral certainty." Cage found that this phrase could be interpreted as allowing a reasonable juror to convict on the basis of a vague "moral certainty" instead of a more exacting standard of an "evidentiary certainty." This Court found that this was particularly true when considered with the words, "substantial" and "grave uncertainty," which it found tended to "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Cage, supra, 490 U.S. 39, 111 S.Ct. 328, 329-330, 112 L.Ed.2d 339.

In California, the phrase "moral certainty" is marshalled on the side of the defendant and not the prosecution. As can be seen in footnote 2 infra, the California jury is told that it must find the defendant guilty beyond a reasonable doubt in order to convict. CALJIC No. 2.90 then defines reasonable doubt as the lack of "moral certainty as to the truth of the charges." As such, the plain language of the statute prohibits the juror from voting for guilt unless he is morally convinced

that the charges are true. However, nothing in the instruction allows him or her to vote for a conviction based solely on his moral belief in guilt. As such, there is no Cage error.

Petitioner also complains that the repeated use of the adjective "moral" in CALJIC No. 2.90 unconstitutionally draws the jury away from its role as an objective evaluator of the evidence into a more subjective arbiter of moral values. Specifically, petitioner complains that the instructional language of CALJIC No. 2.90 "served to obscure the otherwise crucial segregation in the jurors' minds between personally negative responses to the defendant versus the analysis of the prosecution's evidence." Petition, pp. 8-11. As shown above, even if this is true in California, petitioner has no cause to complain because the term merely imposes a higher burden on the state.

Notwithstanding the foregoing, in Cage this Court assessed the propriety of the reasonable doubt instruction by considering how reasonable jurors could have understood the charge as a whole. Cage v. Louisiana, supra, 490 U.S. 39, 111 S.Ct. 328, 329-330, 112 L.Ed.2d 339. Here, in addition to the reasonable doubt instruction, the jury was instructed to base its verdict on the facts of the case and the law. The jury was also instructed it must not be influenced by pity, prejudice, bias, passion, public opinion or public feeling. Specifically, the jurors were instructed:

> "You must not be biased against the defendant because he has been arrested for this offense, or because he

> has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent." CT 1509-1511.

Thus, when the entire instructional phase is viewed as a whole, it is clear the jury in this case did not substitute their moral feelings for their impartial analysis.[4/]

Petitioner further argues that constitutional defects in CALJIC No. 2.90 require reversal of his conviction. Petitioner relies on the recent case of Sullivan v. Louisiana, ___ U.S. ___ (June 1, 1993), in support of his claim. Petition, p. 11.

Respondent first notes that petitioner's reliance upon Sullivan is misplaced. In Sullivan, the trial judge gave a definition of reasonable doubt that was "essentially identical" to the one held unconstitutional in Cage v. Louisiana, supra, 498 U.S. 39. Sullivan v. Louisiana, supra, ____ U.S. ____. Respondent again submits that CALJIC No. 2.90, unlike the instruction discussed in Cage, does not transform the traditional definition of reasonable doubt into a higher degree of doubt but in fact imposes a higher burden on the prosecution. CALJIC No.

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4. In People v. Fook 141 Cal. 548 (1904), the California Supreme Court specifically rejected defendant's claim that use of the phrases "moral certainty" and "moral evidence" permitted the jury to be governed by their impressions and not by their convictions. Id., at p. 549.

2.90 is thus constitutionally sound. People v. Jennings, supra, 53 Cal.3d 334, 386, 279 Cal.Rptr. 780, 807 P.2d 1009.

Moreover, given the fact that CALJIC No. 2.90 merely requires a juror contemplating a guilty vote to be convinced of the truth of the charges, ie., guilt to the point of moral certainty, there is no "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991).

As noted above, a challenged instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole. Boyde v. California, 494 U.S. 370, 380, 110 S.Ct 1190, 108 L.Ed.2d 316 (1990). Also, this Court may assume the jury understood and followed the instructions given them. Francis v. Franklin, 471 U.S. 307, 324, n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Since the jury in this case understood it could not base a finding of guilt upon subjective and ethical considerations rather than upon an objective evaluation of the evidence, there is no reasonable likelihood the jury applied CALJIC No. 2.90 in a way that violates the Constitution. Thus, petitioner's contention must fail.

II

THE CALIFORNIA SUPREME COURT CONDUCTED A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR REIVIEW IN THIS CASE, AND HAS NOT ABDICATED ITS RESPONSIBILITY TO CONDUCT CONSTITUTIONALLY ADEQUATE HARMLESS ERROR REVIEWS IN PREVIOUS CAPITAL CASES

Petitioner contends the California Supreme Court failed to conduct a constitutionally adequate harmless error review of prosecutorial misconduct during penalty phase final argument to the jury thereby depriving him of due process and subjecting him to cruel and unusual punishment. Petition, pp. 11-16. Petitioner further contends the California Supreme Court's affirmance rate since 1990 demonstrates a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review. Petition, pp. 16-25. Petitioner's contentions are without merit.

During penalty phase final argument to the jury, defense counsel told the jury that it was absurd to talk about life and death, and that the death penalty is absurd. He also questioned his right to discuss life and death, and thereby impliedly questioned the jury's right to decide life and death. Defense counsel told the jury that it was playing God, because the jurors had the awesome power of holding petitioner's life in their hands. Finally, making a biblical reference to "an eye for an eye, a tooth for a tooth," defense counsel told the jury that if it reached a verdict of death, it would be out of pure revenge and vengeance: "If that's what you want [an eye for an eye, a

tooth for a tooth, a stripe for a stripe, a life for a life] you push the button." (RT 6499, 6501, 6503, 6512.)

The prosecutor responded by telling the jury that the death penalty is not absurd, but instead a legitimate means of punishment in this state - one the jury could impose *if* it found it appropriate. The prosecutor also told the jurors that they were not playing God, but instead doing what God says. In quoting the Bible, the prosecutor explained that God ordains a governing authority to punish those who do evil. (RT 6537-6540.)

The California Supreme Court ruled that the prosecutor's argument was misconduct, because it exhorted the jury to consider factors outside California Penal Code section 190.3 in making its penalty determination. "What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority." People v. Sandoval 4 Cal.4th 155, 193-194, 14 Cal.Rptr.2d 342, 841 P.2d 862 (1992). However, the Court also ruled the error did not require reversal of the penalty judgment:

> "The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death

> on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. See People v. Brown 46 Cal.3d 432, 448-449 (1988). The result is the same under the federal Chapman test [Chapman v. California 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065] (1968))." People v. Sandoval, supra, 4 Cal.4th 155, 194, 14 Cal.Rptr.2d 342, 841 P.2d 862.

In People v. Brown, supra, 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135, the California Supreme Court determined that the "reasonable-possibility test" is the proper constitutional miscarriage of justice standard when assessing the effect of state-law error at the penalty phase of a capital trial. Id., at p. 448. Thus, in citing Brown and finding there was no reasonable possibility that the jury in this case would have reached more favorable verdicts had the misconduct not occurred, the California Supreme Court clearly found the prosecutorial misconduct in this case to be state-law error which did not amount to a federal constitutional violation.[5]

Petitioner complains the above-cited harmless error review by the Sandoval court was constitutionally inadequate. If petitioner is asserting a federal constitutional right to a

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5. As discussed below, the California Supreme Court also noted that even if the prosecutorial misconduct was federal constitutional error, the error was harmless beyond a reasonable doubt pursuant to Chapman v. California, supra, 386 U.S. 18.

correct state law harmless error analysis, respondent is unaware of any grant of certiorari in a California capital case on a question of the adequacy of appellate review. Thus, petitioner's contention should be rejected.

Moreover, if petitioner is complaining about the California Supreme Court's alternative holding as to federal harmless error, his complaints about the California Supreme Court's review are meritless. First, petitioner asserts there was a finding of federal constitutional error in this case. Petition, p. 12. However, as noted above, the California Supreme Court clearly found the prosecutorial misconduct in this case to be state-law error which did not amount to a federal constitutional violation. People v. Sandoval, supra, 4 Cal.4th 155, 194.)

Secondly, petitioner argues prejudice can be shown by the jury's verdict of death for the murder of Marlene Wells, since "each verdict was necessarily based on the same corpus of aggravating and mitigating evidence." Petition, p. 15.

The facts of this case conclusively demonstrate, however, that even if the error was of constitutional dimensions, it was harmless beyond a reasonable doubt. The verdicts clearly indicate that the death penalty was imposed, not because of any argument by the prosecutor, but instead based on the motive for the killing. Here, petitioner killed four people. He could have been given a death sentence for each of the killings. However, the jury only returned a death verdict for one of the killings.

This is because the totality of the aggravating and mitigating circumstances was not precisely the same for each count. Petitioner killed Marlene Wells because she saw him kill her husband. RT 3296. Therefore, unlike any of the other murder victims, petitioner subjected Marlene Wells to watching the death of a loved one before killing her and she was the only victim killed merely because of her status as a witness.

Moreover, petitioner shot and killed Gilbert Martinez and Anthony Aceves during a gang-related fight at Belvedere Park. Petitioner killed Ray Wells because he thought Wells had given police information concerning the location of the car he had used on the night of the Belvedere Park murders. Petitioner did not have a dispute with Marlene Wells. She was a completely innocent victim who died because she saw petitioner kill her husband.

At the penalty phase, "the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death." People v. Lewis 50 Cal.3d 262, 283-284, 266 Cal.Rptr. 834, 786 P.2d 892 (1990). Since Marlene Wells was a completely innocent victim who was forced to watch the death of a loved one before receiving gunshot wounds to the head and neck, respondent submits the jury's moral assessment that petitioner should be put to death was appropriate under all of the circumstances.

Although petitioner decries the analysis of the California Supreme Court as deficient, it is clear the harmless

error review conducted by that body noted the presence of those split verdicts. Not only do the split verdicts indicate the death penalty was imposed on petitioner due to the reason he killed that particular victim as opposed to the other victims, but, from a standpoint of common sense, if the jury had been emotionally swayed by the prosecutor's argument it would have imposed death for all four of the killings and not just one. Here, to the contrary, petitioner's argument is predicated upon the inherently unlikely scenario the jury was able to ignore the prosecutor's comments while returning three life verdicts but finally succumbed to the argument when deciding on the fourth verdict. Petitioner's contention lacks gravity. It is clear beyond a reasonable doubt that the sole verdict of death was wholly attributable to the facts of that murder and not to the improper argument of the prosecutor. As such, despite its brevity, the facts of the case demonstrate the propriety of the finding of harmless error in the state court opinion.

Petitioner also argues the Sandoval court's review was inadequate because that court used criteria which weigh in favor of a finding of prejudice. Specifically, petitioner asserts without citation that the federal courts have spoken "with one voice" that lengthy and close jury deliberations weigh in favor of a prejudice finding when a constitutional error has occurred. Petition, pp. 12-14. Petitioner is mistaken.

Respondent again notes there was no constitutional error in this case. In addition, contrary to petitioner's claim,

the length and closeness of jury deliberations does not "uniformly militate in favor of reversal." Petition, p. 13. For example, in United States v. Phillips 664 F.2d 971 (5th Cir. 1981), the court held that continuation of deliberations for an entire week after the alternate juror was impaneled negated any possible coercive effect or any undue prejudice. Id., at pp. 995-996. Similarly, as noted by the California Supreme Court in its harmless error analysis, the fact the jury in this case did not immediately return with verdicts of death demonstrated the prosecutor's argument obviously did not impassion the jurors to immediately return its verdict of death.

Petitioner also argues the closeness of the jury split prior to its decision provides an "overwhelming basis to infer prejudice." Petition, p. 12. However, the jurors had the difficult task of deciding whether to impose a penalty of death. The members of the jury, both by their verdicts and responses when individually polled, clearly expressed their decision that death was the appropriate punishment for the killing of Marlene Wells. Petitioner's claim is based upon mere speculation and should be rejected.

Petitioner further argues the California Supreme Court's harmless error analysis was inadequate in light of the dissenting opinion of Justices O'Connor and Kennedy in Pensinger v. California __ U.S. __, 112 S.Ct. 351, 116 L.Ed.2d 290 (1991). Respondent submits petitioner's reliance upon the dissent in Pensinger is misplaced.

In Pensinger, the jury found the existence of two special circumstances: the murder was committed in the course of a kidnapping, and the murder was accompanied by the infliction of torture. The California Supreme Court reversed the jury's finding as to the special circumstance of torture, because the jury was not instructed that the circumstance required proof of intent to torture. The Court found the instructional error was not harmless, but upheld the sentence of death because "the erroneous special circumstance finding was only a statutory label which could not have affected the verdict in light of the evidence properly before the jury." People v. Pensinger, 52 Cal.3d 1210, 1255, 278 Cal.Rptr. 640, 805 P.2d 899 (1991).

This Court denied the petition for writ of certiorari to the California Supreme Court. Pensinger v. California, supra, __ U.S. __, 112 S.Ct. 351, 116 L.Ed.2d 290. However, dissenting Justices O'Connor and Kennedy were of the opinion the petition should be granted and that the California Supreme Court's review was insufficient under Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). In Clemons, this Court found the jury had considered an unconstitutionally vague aggravating circumstance, and held the reviewing court could either excise the erroneously considered aggravating circumstance and reweigh the evidence on its own or determine whether the jury would beyond a reasonable doubt have imposed the death sentence even in the absence of the error. Id., at pp. 750-752.

Dissenting Justices O'Connor and Kennedy were of the

opinion that the harmless error review in Pensinger was inadequate because "the California Supreme Court did not reweigh the aggravating and mitigating circumstances" or review the record "to determine whether the jury would beyond a reasonable doubt have imposed the death sentence given a finding of one special circumstance rather than two . . ." Pensinger v. California, supra, __ U.S. __, 112 S.Ct. 351-352, 116 L.Ed.2d 290.

Respondent submits petitioner's reliance upon the dissent in Pensinger is clearly misplaced. Here, the death sentence was not based on an invalid or improperly defined aggravating circumstance in the weighing process of the penalty determination which this Court has found to be of great import. See Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 117 L.Ed.2d. 367 (1992). Instead, the California Supreme Court found a state law error during final argument which was harmless because there was no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. Even so, if the California Supreme Court was required to reweigh the effect of the error, it clearly did so and thus petitioner's contention should be rejected.

Finally, petitioner disagrees with the California Supreme Court's finding of harmless error, and argues he was prejudiced by the prosecutor's argument. Petition, pp. 14-15. Petitioner first argues prejudice is clear given the "evidentiary equipoise between aggravating and mitigating evidence in this

case." Petition, p. 14. Respondent disagrees. The evidence of aggravation in this case was compelling. The circumstances of the cold-blooded multiple murders and appellant's history of violence could not help but impress the jury. The evidence in mitigation, by contrast, established only that petitioner had a tough childhood and was civil to persons who were not his victims.

Petitioner further argues the jury used the prosecutor's argument as the mechanism to resolve their deadlock. "The prosecutor's religious argument appears to have been just the balm needed for the pro-life jurors to assuage their consciences for returning a single death judgment." Petition, p. 15. Petitioner is incorrect.

Contrary to petitioner's claim, religious law and authority was not a factor considered in this jury's capital sentencing determination. Instead, the jury in this case was instructed to consider the evidence received during the penalty phase of the trial, the circumstances of the crime and the existence of any special circumstances found to be true, the presence or absence of criminal activity by appellant which involved the use of force or violence, the presence or absence of any prior felony convictions, whether or not the offense was committed under circumstances which appellant reasonably believed to be a moral justification or extenuation for his conduct, appellant's age at the time of the crime, and any other circumstance which extenuated the gravity of the crime. CT 1694-

1695. This Court can presume the jurors understood and followed the instruction which explained the factors to consider in determining the appropriate punishment. Francis v. Franklin, supra, 471 U.S. 307, 324, n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344.

In sum, the evidence of aggravation was compelling and the jury was clearly instructed that the arguments of counsel were not evidence. CT 1689. Respondent submits therefore that any error was harmless beyond a reasonable doubt. See Chapman v. California, supra, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.[6/]

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6. Recently, in Sullivan v. Louisiana, supra, __ U.S. __ (June 1, 1993), the United States Supreme Court considered whether what it deemed "structural error" under Cage v. Louisiana, supra, 490 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339, could ever be amenable to a Chapman type harmless error analysis. Writing for the Court, Justice Scalia reasoned backward by first asking whether a harmless error analysis would be proper to assess a "structural error." He concluded that it would not be based on his view that it was impossible "to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings that support the verdict might be . . ." But the foregoing language related solely to error constituting a structural defect in the trial process, there the failure to adequately instruct the jury on reasonable doubt. Since the jury was never instructed properly on reasonable doubt, a fundamental requirement of a fair trial, Sullivan held that it was impossible to theorize what a jury would do if properly instructed on that doubt since entitlement to that instruction was itself the crucial right. However, this language has been recently misinterpreted by some legal scholars to apply to "non-structural errors" where it *is possible to hypothesize* a guilty verdict by removal of the offending evidence. (See People v. Mitchell Sims, __ Cal.4th __ (June 28, 1993), dissn. opn. by Mosk, J. [applied to violation of Miranda rights].) Those commentators erroneously read Sullivan to require that the reviewing court find that no constitutional error is harmless if it in any way *contributes* to the verdict. As shown above, this was clearly not the import of Sullivan.

Finally, petitioner contends the California Supreme Court's affirmance rate since 1990 demonstrates a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review. Petition. pp. 16-25. Petitioner's contention is without merit.

Whatever deficiencies there may have been in the California Supreme Court's review of other capital cases are irrelevant to the instant determination. If the California Supreme Court has properly decided the issues before it in this case, that ends the matter. Respondent notes in general defense to the California Supreme Court, however, that any constitutional infirmities in the handling of other capital cases by that court were all susceptible to certiorari review by this Court, and respondent is unaware of any grant of certiorari in a California capital case on a question of the adequacy of appellate review.

In addition, as argued above, the California Supreme Court correctly engaged in the harmless error review of a state law error which did not amount to a federal constitutional violation. Petitioner is entitled to nothing more.

CONCLUSION

Since the California Supreme Court fairly decided this case in accord with the decisions of this Court, the petition for writ of certiorari should be denied.

Dated: July 14, 1993

Respectfully submitted,

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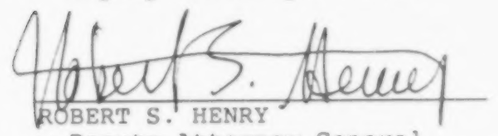

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